Supreme Court, U.S.
FILED

No. 98-274 AUG 12 1998

In The

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1997

DON R. TYLER, Plaintiff, Petitioner

vs.

STATE OF FLORIDA-GOVERNOR LAWTON CHILES and **DEPARTMENT OF INSURANCE-COMMISSIONER OF INSURANCE TOM GALLAGHER,** and **FLORIDA DIVISION OF RISK MANAGEMENT-DIRECTOR R. J. CASTELLANOS,** and **FLORIDA DIVISION OF INSURANCE FRAUD-DIRECTOR FRANK DOOLITTLE,** and **FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES-COMMISSIONER BOB CRAWFORD,** and **FLORIDA DIVISION OF FORESTRY-DIRECTOR L. EARL PETERSON,** and **CRAWFORD AND COMPANY-CEO FORREST MINIX,** and **WILLIAM L. EARP, M.D.,** and **WILLIAM A. FRIEDMAN, M. D.,** and **J. MASON WINES,** attorney at law, Defendants, Respondents.

On Petition For Writ of Certiorari

To the Circuit Court, Tenth Judicial Circuit, Polk County, Florida

PETITION FOR WRIT OF CERTIORARI

By **Lynda S. Tyler,** Next Friend and
Durable Power of Attorney for
Petitioner and
Don R. Tyler, Petitioner
5730 JoAnn Road
Haines City, FL 33844 941/422-4140

1. Whether Mr. Tyler was denied his civil rights under **Title 42 U.S.C. §1983**, right to an action at law, and **U.S.C.A. VII** right to trial by jury in a case involving fraud, fiduciary relationships, agency involvement. gross and malicious negligence and a proper demand made for trial by jury?

2. Whether the **Fair Labor Standards Act of 1938** was breached when Mr. Tyler was denied the right to present his case of fraudulent denial of overtime in a court of law?

3. Whether the Florida Second District Court of Appeal's rulings went against other District Court case law and the Florida Supreme Court as well as breached **F. S. §38.08** and **Title 42 U.S.C. §1983**?

4. Why was the Order from the 2nd DCA, not an opinion or per curiam, and why was it never published ?

The parties to this case are as follows: **Don R. Tyler**, Petitioner

and

The State of Florida, and **Florida Department of Insurance**, and **Florida Division of Risk Management**, and **Florida Division of Insurance Fraud**, and **Florida Department of Agriculture and Consumer Services**, and **Florida Division of Forestry**, and **Crawford and Company**, and **William L. Earp, MD.**, and **William A. Friedman, MD.**, and **J. Mason Wines**, attorney at law, are the Respondents.

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STATEMENT OF THE CASE

The Orders and judgments sought to be reviewed are Circuit Judge J. Dale Durrance's Order entered in the Court record on February 23, 1996 and Circuit Judge Robert A. Young's Orders entered in the Court record on July 22, 1996 and September 3, 1996 and the Florida Second District Court of Appeal Order entered in the Court record on November 19, 1997 and the Florida Supreme Courts denial of Mr. Tyler's Motion to Amend, May 11, 1998 and denial of discretionary review on May 26, 1998. **(See appendix pg. A-M)**

The February 23, 1996 order was a final order and then Judge Durrance recused, a timely reconsideration motion was filed and Judge Young ruled against the Second Amended Complaint on September 3, 1996. Mr. Tyler filed a timely appeal on September 30, 1996. The Fla. 2nd DCA filed their order on November 19, 1997, and denied a rehearing on January 14, 1998. Mr. Tyler filed his notice for discretionary review with the Florida Supreme Court on February 10, 1998 and they denied review on May 27,

1998. The Florida Supreme Court changed the heading of the case from Don R. Tyler v. State of Florida, et al., to Don R. Tyler v. Lawton Chiles, Governor, et al. They refused to correct this.

The Supreme Court of the United States has jurisdiction to review this Writ of Certiorari under **Title 28 §1257.**[1]

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are: **U.S.C.A. VII**[2],

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[1]"**State courts; certiorari** (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ....where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of...the United States."

[2]"In Suits at common law, where the value in controversy exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S.C.A. XIV[3], **F.L.S.A. of 1938**[4], **The Americans With Disabilities Act of 1990** as referenced in **Administrative Order No. 1-21.0(see Appendix pg N-O) Title 42 §1983,**[5] **Title 18 U.S.C.§1961 &**

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[3]**§ 1.** "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.....nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4]**§7.(k)** "No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities... if—

...compensation at a rate not less than one an one-half times the regular rate at which he is employed."

[5]"Civil action for deprivation of rights - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...,subjects or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§1959 (see appendix pg. P-Q), Title 18 U.S.C. §4 Misprision of Felony as defined in Black's Law Dictionary, 1993 Edition (see appendix pg. Q-S) F.S.§38.08[6] ,F.S.95.031[7], F.S.C. Art. I, §2, §9, §21, F.S. §440.10, §440.11, §440.15, and §440.105,

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[6]**§38.08** ...The fact that an order was entered by a judge who is subsequently disqualified under s.38.02 or s. 38.05, shall not be assignable as error subject to review by the appropriate appellate court unless a petition for reconsideration as provided for in s. 38.07 was filed by the party urging the matter as error, and the judge before whom the cause was then pending refused to vacate or modify said order.

[7]**§95.031 Computation of time.**—(2) Actions for...fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

§440.12, 440.49(1995) and, **(see appendix pg. S-X)**, and **F. S. §895.02.**[8]

The original Complaint was filed on March 3, 1994, against the State of Florida and its departments and divisions, a proper demand for a trial by jury was made on each of the four counts, including breach of the **F.L.S.A.** The State claimed indispensable parties and the Amended Complaint was filed on June 24, 1994, also containing a proper demand for a jury trial and breach of the **F.L.S.A.**, adding Crawford and Company, Dr. Earp, Dr. Friedman and Attorney Wines. Circuit Judge Oliver L. Green granted the motions to dismiss on

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[8]**§895.02(1)** "Racketeering activity" means to commit to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit (a) any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes: 5. Section 440.105 or s. 440.106, relating to workers' compensation. 23. Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, ... 30. Chapter 843, relating to obstruction of justice. 37.(b) Any conduct defined as "racketeering activity" under 18 U.S.C. s. 1961(1).

October 10, 1994 and recused himself on October 19, 1994. He did not give any law, case law or any other reasons for granting the motions to dismiss in the pre-trial hearing or his order.

Circuit Judge Susan W. Roberts was assigned the case and refused to reconsider although **F. S. §38.07** required her to do so **(see appendix pg. O)**. In a pre-trial hearing on December 22, 1994 she granted Mr. Tyler the right to amend. Mr. Tyler filed his Second Amended Complaint on December 27, 1994. It contained proper demands for a jury trial.

There was a pre-trial hearing at which Judge Roberts made no oral rulings, but said that she would make a decision later. She then granted the motions to dismiss with prejudice, but she cited no law or gave no explanations for her actions. She recused herself on April 25, 1995.

Chief Judge Randall McDonald reassigned the case from Circuit Court in Polk County to County Judge Earl Collins in Hardee County. County Judge Collins immediately recused himself. Chief Judge McDonald

reassigned the case to Circuit Judge J. Dale Durrance in Hardee County (there were at least 13 circuit judges in Polk County and only one in Hardee County when this took place). Before Circuit Judge Durrance took any action on the case, it was reassigned to County Judge Olin W. Shinholser in Highlands County.

This was against **F.S. §26.57.**[9] County Judge Shinholser ruled against Mr. Tyler without even a pre-trial hearing, even though Judge Shinholser was quoted the law and told that he did not have jurisdiction.

Mr. Tyler filed many motions and also wrote a letter to Florida Supreme Court Justice Grimes. Finally after about three and a half months, the reassignment to Judge Shinholser was set aside and Circuit Judge

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[9]**Temporary designation of county court judge to preside over circuit court cases.**—In each county where there is no resident circuit judge and the county judge has been a member of the bar for at least 5 years and is qualified to be a circuit judge, the county court judge may be designated on a temporary basis to preside over circuit court cases by the Chief Justice of the Supreme Court upon recommendation of the chief judge of the circuit...

Durrance continued on the case. Why would the chief judge take a Polk County Circuit Court case and send it to Hardee County to a county judge without giving him acting circuit judge status and then take a case from a circuit judge in Hardee and give it to a county judge in Highlands? Was this to limit the damages that could be collected or simply a ploy to confuse matters in the hopes that Mr. Tyler would fail to file proper motions?

Judge Durrance granted the reconsideration. Mr. Tyler filed a request for reasonable accommodations for Mrs. Tyler, his next friend and durable power of attorney, to be allowed to speak for him as he was taking a prescribed narcotic pain medication and was diagnosed with short term memory loss due to his constant pain. He claimed this under the **A.D.A. of 1990** and **Administrative Order No. 1-21.0** and **F. S. §744.1012(see appendix pg. N-P)**. This was denied in all hearings by Judge Durrance and later by Judge Young. Judge Young even threatened to charge Mrs. Tyler with attorney fees if she spoke.

Judge Durrance had the reconsideration pre-trial hearing on January 8, 1996, gave no rulings, and then granted the motions to dismiss on January 16, 1996. Judge Durrance then dismissed the Second Amended Complaint without a trial, much less a trial by jury and giving no law, findings of facts, case law or any reasons at all for his actions in hearings or on paper **(see appendix pg. A-B).**

Judge Durrance would send a copy of his order to the parties, but not file it with the clerk until after Mr. Tyler had filed a motion against it so that Mr. Tyler would file his motion too soon. The February 23 order was sent to everyone on February 14th but not filed until Mrs. Tyler called his office and asked if it was going to be filed. On March 4, 1996, she called the clerk's office and was informed that Judge Roberts, who recused herself from the case on May 25, 1995, told circuit court clerks not to file Mr. Tyler's Motion for Clarification and Rehearing which he filed on February 28, 1996, but to give it to Judge Durrance and let him decide what to do with it. Mrs. Tyler spent the day on the phone going up

the chain of command all the way to "Bud" Dixon, Clerk of the Court, who put a stop to this illegal activity.

Mr. Tyler filed a petition for mandamus or in the alternative petition for prohibition with the Fla. 2nd DCA on March 8, 1996 (it was denied, but there is more to this story,) **(see appendix pg. BB-HH)**. Then a recusal came from Judge Durrance that stated it was signed on March 6, 1996, but the signature was not his, it was a forgery. He finally recused on May 29, 1996.

On June 14, 1996, Mr. Tyler filed a timely motion for reconsideration and cited **U.S.C.A. VII**. In the pre-trial hearing the new judge, Circuit Judge Robert A. Young looked in the case file and said he could not find the motion for reconsideration. He started figuring what date it was due by and turned to counsel for the State, Attorney Scales, instead of Mr. Tyler, and asked when the motion for reconsideration was filed. Attorney Scales said June 24th, which would have made the motion one day late. Mrs. Tyler said it was filed on the 14th. Judge Young ignored her and continued talking to Mr. Scales until he glanced at the paper in Mrs. Tyler's

hand and asked to see it. There at the top of the page was the clerk's date stamp. Mrs. Tyler always hand delivered the paperwork to the clerk in Bartow and had Mr. Tyler's copy date stamped (she usually had a courtesy copy, which she put in the judge's box, stamped also, but she didn't get the judge's copy stamped this time). Judge Young looked at the motion and saw that it was date stamped by the clerk on June 14th. He then admitted that he had received a courtesy copy on June 17th. Mr. Scales would have received his copy by June 17th also. None of the other three attorneys said they had received theirs earlier? Mr. Duffy (attorney for Crawford & Co.) did not show up for the first time and Laurie Dodson was not prepared to argue the case, she had to borrow a copy of Crawford & Company's motion to dismiss and read it. Mr. Varner appeared by phone that day.

Judge Young gave no rulings during the pre-trial hearing and then filed an order on July 22, 1996 which

only granted the **motion to dismiss**[10] (although there were five motions to dismiss) the **Amended Complaint** with prejudice (the Amended Complaint was not at issue it had been replaced by the **Second Amended Complaint** since December 27, 1994.)[11]

Mr. Tyler then filed a motion for clarification on July 29, 1996 in which he cited,

> **Conley v. Gibson, 2 L Ed 2d 80, 81(U.S. Supreme Court, 1957),** "A complaint should not

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[10] "That is, it has been held that an order which grants a motion to dismiss is neither a final order nor an appealable nonfinal order. *Board of County Commissioners v. Grice, 438 So 2d 392 (Fla. 1983): Johnson V. First City Bank, 491 So 2d 1217 (Fla. 1st DCA 1986)"* **Benton v. Moore, 655 So 2d 1272, 1273 (Fla. 1st DCA 1995)**

[11] "An amended pleading which is complete in itself, and does not refer to or adopt a former pleading as a part of it, supersedes the former pleading which ceases to be a part of the record." **Watkins v. Sims, 88 So. 704, 707(Fla. 1921).** "By filing amended declaration, plaintiff abandoned original declaration and it no longer served any purpose in record." **Dee v. Southern Brewing Co., 1 So 2d 562, 563 (Fla. 1941).**

be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (cited earlier to Judge Durrance)

He also quoted **Black's Law Dictionary's** definition of **Misprision** and **Misprision of Felony** **(see appendix pg. O)**. He also presented Judge Young with **Title 18 U.S.C. §1959 & §1961** and **F.S. §895.02** "Racketeering" in later paperwork.

On August 26, 1996, Mr. Tyler filed a notice for a jury trial date to be set. Judge Young then filed his order, recorded on September 3, 1996, **ORDER ON PLAINTIFF'S MOTION FOR CLARIFICATION AND NOTICE FOR JURY TRIAL,** which stated:

"Because the Court intended to, and by its earlier order, did dismiss Plaintiff's Second Amended Complaint partly with prejudice ..."

This was the first order of Judge Young's which mentioned the **Second Amended Complaint** and the closest he came to dismissing it.

Mr. Tyler filed his appeal to the 2nd DCA on September 30, 1996. Mr. Tyler presented **Title 42 U.S.C. §1983, U.S.C.A. VII,** and the **F.L.S.A.** in his Initial Brief on December 9, 1996. This was denied on November 19, 1997(on jurisdiction, they did not rule on the merits of the case), a timely rehearing was filed and denied on January 14, 1998. He then filed his notice of discretionary review on February 10, 1998 with the Florida Supreme Court and discretionary review was denied on May 27, 1998.

ARGUMENT

1. **Whether** Mr. Tyler was denied his civil rights under **Title 42 U.S.C. §1983,** right to an action at law, and **U.S.C.A. VII** right to trial by jury in a case involving fraud, fiduciary relationships, agency involvement. gross and malicious negligence and a proper demand made for trial by jury

> "5. The Defendants, **STATE OF FLORIDA... CRAWFORD AND COMPANY, WILLIAM L. EARP, M.D., WILLIAM A. FRIEDMAN, M.D., and ATTORNEY J. MASON WINES,** broke **s.s.**

440.37(1983 and earlier), **s.s. 440.105** and **440.106**(1994) through the omission of or not requiring a Maximum Medical Improvement Date for the Plaintiff, therefore making it impossible for the Plaintiff to receive a permanent impairment rating... This omission and fraud took place after the Plaintiff underwent major back surgery and had a laminectomy and discectomy on July 1, 1983. This resulted in the Plaintiff being injured, defrauded, and deceived through constructive fraud due to fiduciary relationships; employer/employee, physician/patient, adjustor/adjustee, and attorney/client. This constituted "fraud" because the above omissions denied the Plaintiff benefits under **s.s. 440.15 ...** The Plaintiff trusted his employer, doctors, attorney, and adjusting firm and did not know they were defrauding him and causing him further damage."(Exert from the Second

Amended Complaint)[12]

F. S. §440.15(a)(1) (1995) "Once the employee has reached the date of maximum medical improvement, impairment benefits are due and payable within 20 days after carrier has

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[12]"Maximum medical improvement" marks date at which recovery or lasting improvement from injury can no longer be anticipated; determination of maximum medical improvement is essentially medical question." **Florida Power Corp. v. Hamilton, 657 So 2d 1250(Fla. 1st DCA 1995)** "**2.[9.14]** Maximum Medical Improvement - In the first instance, no such case may be settled until six months after claimant has reached maximum medical improvement **F. S. 440.20(12)(a)." Florida Workers' Compensation Practice (1985), THIRD Edition, copyright 1986, pg. 322** "Under Florida Law, person acting in fiduciary or confidential capacity has duty to make full and fair disclosure of material facts to person reposing confidence in fiduciary." **F.D.I.C. v. Martin, 801 F. Supp. 617 (M.D. Fla. 1992)** "Where a charge of unfair dealing is made by a client against his attorney, the burden is on the attorney to show fairness." **Halstead v. Florene Citrus Growers' Assoc., (1932) 104 Fla. 21, 139 S. 132**

knowledge of the impairment."

"35. Plaintiff further alleges that his employer/carrier made use of third parties, Plaintiff's two doctors (Earp and Friedman) and attorney (Wines), and its agent (Crawford and Company) to defraud and deceive Plaintiff of any benefits after the July 1, 1983 back surgery..." (Exert from Second Amended Complaint)[13]

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[13]"Under common law, fraud may be established when defendant has made use of third party to reach target of fraud." **Tanner v. U.S.S.Ct. 2739, 483 US 107, 97 L. Ed. 2d 90, on remand US v. Conover, 845 F. 2d 266 (US Fla. 1987)** "Fraud therefore, in its general sense, is deemed to comprise anything calculated to deceive, including all acts, omissions, and concealment involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another, or by which an undue and unconscientious advantage is taken of another. **Fraud and Deceit, 37 Am Jur 2d s. 1, pg. 19** "Under Florida law, silence can be equated with fraud where there is legal or moral duty to speak or where inquiry left unanswered would be intentionally misleading." **Blackhawk Tennessee, Ltd. Partnership v. Waltemyer, 900 F. Supp. 415 (M.D. Fla.**

"43. Defendants...**FLORIDA DIVISION OF FORESTRY** knew... that the Forest Ranger job was very physically demanding; and they also knew that Plaintiff was already performing this job with a permanent partial disability of 15% after a 1979 on the job accident. Plaintiff alleges working him at this same physically demanding job after his having a lumbar laminectomy and discectomy on July 1, 1983, constitutes "gross and malicious negligence" because this has led to his being further damaged to permanent and total disability to work.... " (Exert from the

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1995) "Existence of agency relationship is ordinarily question to be determined by jury in accordance with evidence adduced at trial, and can be proved by facts and circumstances on case-by-case basis."**Orlando Executive Park, Inc. v. Robbins, 433 So 2d 491 (Fla. 1983)** Fact of agency, and the boundaries of an agent's authority, are determinable as questions of fact by the jury." **Cavic v. Grand Bahama Development Co., Ltd., 701 F. 2d 879 (C.A. 11 Fla. 1983)**

Second Amended Complaint.)[14]

"WHEREFORE,... Plaintiff further demands a jury trial on all issues triable as of right by a jury."(Exert from Second Amended Complaint, this statement was also at the end of each count in the original complaint and

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[14]"Whether duties have been breached is ordinarily question for jury to decide." **Handcock v. Department of Corrections, 585 So 2d 1069 (Fla. 1st DCA 1991)**"In *Fisher v. Shenandoah General Construction Co., 498 So. 2d 882 (Fla. 1986),* the Florida Supreme Court held that an employee can bring a cause of action in tort if the employer's actions exhibit a deliberate intent to injure or if the employer engages in conduct which is substantially certain to result in injury or death." **Cunningham v. Anchor Hocking Corp., 558 So 2d 93, 95 (Fla. 1st DCA 1990)** "If harm that occurs is within scope of danger created by a defendant's negligent conduct, then such harm is a reasonably foreseeable consequence of negligence. Question of foreseeability as it relates to proximate cause and whether an intervening cause is foreseeable is for trier of fact." **Budet v. K-Mart Corp., 591 So 2d 1248, 1249 (Fla. 2d DCA 1986)** "Question of whether an intervening cause is foreseeable is for trier of fact." **Dunn v. Schurga, 533 So 2d 1192 (Fla. 2d DCA 1988)**

amended complaint and a similar demand was included in almost every paper filed by Mr. Tyler.)[15]

2. **Whether** the **Fair Labor Standards Act of 1938** was breached when Mr. Tyler was denied the right to present his case of fraudulent denial of overtime in a court of law.

"81. Plaintiff alleges that he was "fraudulently denied overtime" all the years that he was

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[15]Once party demands trial by jury, that party's right is preserved inviolate and can only be waived by affirmative act, such as specific waiver in writing or announcement in court. *West's F.S.A. RCP Rule l.430(b)."* **Adkins, Jr. v. Winkler, 592 So 2d 357, 358 (Fla. 1st DCA 1992)** "Suits for damages under the Fair Labor Standards Act are within the Seventh Amd. Guarantee of a jury trial F.L.S. Act of 1938,s.s. 16, 17, 29 U.S.C.A. s.s. 216, 217, U.S.C.A. Const. Amend. 7." **Rogers v. Exxon Research & Egineering Co., 550 F. 2d 834, certiorari denied 98 S. Ct. 749, 434 U.S. 1022, 54 L. Ed 770.** "Private actions by employees for back pay under the Fair Labor Standards Act include the right to trial by jury. **F.L.S.A. of 1938 s.s.1 seq as amended 29 U.S.C.A. s.s. 201 et seq., Altman v. Stevens Fashion Fabrics, 441 F. Supp. 1318 (D.C. Cal. 1977)"**

employed by the Defendants,...**FLORIDA DIVISION OF FORESTRY.** This fraud was accomplished by deception because the Plaintiff asked to be paid his overtime instead of being given time off, but he was always told that the defendants did not have to pay overtime, that they could give time off instead. Another part of the fraud was that the Plaintiff was given the time off at straight time and not time and a half. Defendants also replaced earned sick and annual leave days with overtime hours at straight time. Plaintiff did not know about the **Fair Labor Standards Act and** his rights until 1992.

(Exert from the Second Amended Complaint.)[16] Mr. Tyler exhausted State Administrative means before reverting to an action at law.

3. **Whether** the Florida Second District Court of

[16a]...An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court oj competent jurisdiction..." **F.L.S.A. §16(b)**

Appeal's rulings went against other District Court case law and the Florida Supreme Court as well as breached **F. S. §38.08** and **Title 42 U.S.C. §1983**.

The 2nd DCA did not rule on the merits of the Second Amended Complaint. They said that Mr. Tyler's appeal was not timely, that he should have appealed Judge Young's July 22, 1996 order. The July 22, 1996 order only granted the motion to dismiss the **Amended Complaint** with prejudice. There were five motions to dismiss and the case in question was the **Second Amended Complaint**. Aside from the fact that Judge Young did not even address the proper complaint, Florida case law does not allow an appeal from an order which only grants motions and does not dismiss the cause.[17]

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[17]"Order granting motion to dismiss with prejudice is not appealable." **Wetterauer v. Frontenac Flea Market, Inc., 573 So 2d 138, 139(Fla. 5th DCA 1991)** "An order granting a motion to dismiss "with prejudice" is an order granting a motion, not an order dismissing an action, and it is not appealable." **McPheeter v. Tolbert, 561 So 3d 18 (Fla 5th DCA 1990)** "The District Court of Appeal had no

The Second District Court's written opinion stated, "..on July 22, 1996, entered an order which essentially affirmed Judge Durrance's previous final order."[18]

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jurisdiction to hear appeal of order granting motion to dismiss amended complaint for failure to state cause of action; the order was not "final" and appealable and was not nonfinal order subject to review by interlocutory appeal." **Fisher v. NCNB National Bank, 507 So 2d 737 (Fla 4th DCA 1987)** and **State v. Feagle, 605 So 2d 824 (Fla 1st DCA 1991), Allen v. Florida Dept. of Military Affairs, 576 So 2d 971 (Fla 5th DCA 1991), etc.** "...an order that merely grants a motion to dismiss a complaint but fails to actually dismiss it is not a final decision that will support an appeal under the final judgment rule." **§72.—Dismissal of complaint or petition, 3 Fla Jur 2d 1997, pg. 104-105**

[18]"While it appears from the July 27, 1987 order that the court had intended to dismiss the complaint, we cannot under these circumstances elevate intended substance over form. It is established that the form of orders of this kind is determinative. *See Gries Investment Co. v. Chelton, 388 So. 2d 1281, 1282 (Fla. 3d DCA 1980); Guth v. Howard, 362 So 2d 725 (Fla 2d DCA 1978) (an order granting a motion to dismiss is not an order of dismissal). See also Scott v. Waste Management, Inc. of Florida, 537 So 2d 686*

And Judge Durrance's final order stated: "..the court orders that Plaintiff's Second Amended Complaint be, and that the same is hereby, dismissed with prejudice."

Judge Young's July 22, 1996 order stated:

"**ORDERED AND ADJUDGED** that the motion to dismiss the Amended Complaint is **GRANTED** with prejudice."

An order granting a motion to dismiss the Amended Complaint could not be appealed and did not **essentially affirm** a final order which dismissed the Second Amended Complaint.

F. S. §38.08 did not even allow Mr. Tyler to appeal Judge Durrance's final order, because of the recusal, as long as Judge Young's order modified Judge Durrance's order. The July 22, 1996 order did modify

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(Fla 4th DCA 1989). It is therefore of no significance for present purposes that plaintiffs failed to appeal within thirty days, or to file a motion for rehearing within ten days, following entry of either the January 20, 1987 order or the July 27, 1987 order." **Chesbrough v. Shope, 544 So 2d 1078 (Fla 2d DCA 1989)**

because it granted a motion to dismiss the Amended Complaint instead of dismissing the Second Amended Complaint.[19]

4. Why was the Order from the 2nd DCA, not an opinion or per curiam, and why was it never published?

The paperwork issuing from the Florida Second District Court of Appeal on Mr. Tyler's case does not match the format of all other Florida DCA cases including the 2nd DCA's. The case file contains just an order, which is written like an opinion, but it is not an opinion or per curiam. Mr. Tyler went to the 2nd DCA and looked at two other case files in which Parker was also the chief judge. One was an opinion and one was a per curiam. They both contained a cover sheet stapled

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[19] "...The fact that an order was entered by a judge who is subsequently disqualified under s. 38.02 or s. 38.05, shall not be assignable as error subject to review by the appropriate appellate court unless a petition for reconsideration, as provided for in s. 38.07, was filed by the party urging the matter as error, and the judge before whom the cause was then pending refused to vacate or modify said order."

to the opinion and per curiam with the judges' signatures and dates they had the case file. The opinion and per curiam contained these words at the top, "NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED." Mr. Tyler's did not contain this statement.

Under the listing of the parties the opinion stated:

"Opinion filed November 12, 1997

Appeal from the Circuit Court....

PARKER, Chief Judge.

Then the opinion was written and concluded with:

FRANK and WHATLEY, JJ., Concur,

It was not signed by the clerk. The per curiam was the same format except instead of "PARKER, Chief Judge" it said "PER CURIAM" and ended with "PARKER, C.J., and FRANK and WHATLEY, JJ., Concur, it was not signed by the clerk.

Mr. Tyler just had an order signed by the clerk, attached to the cover sheet.

The cover sheet on the other two cases said OA and gave the date of oral argument. Mr. Tyler's said

OAW meaning oral argument waived. Mr. Tyler filed a request for oral argument at the time he filed his last brief according to **Rules of Appellate Procedure §9.320**. He received an order denying oral argument as untimely filed (if the case is not actually going before any judges, then somebody better get rid of oral argument). Clerks who did not allow a petition for mandamus to go through certainly were not going to let the appeal go to the judges.

All Florida appellate cases are published in the Southern Reporter. The cover sheet said publish ✔, but as of July 31, 1998, it has not been published **(See appendix pg X-AA).** It is not in the proper format for publication.

CONCLUSION

Mr. Tyler has always been proud to be an American, he served his country as a U.S. Marine and received an honorable discharge. He took an oath to serve his country and he did. By the same token, Mr. Tyler has always been proud to be a native Floridian. When he went to work as a Florida Forest Ranger in

March, 1969, he again took an oath to serve his Country and his State. He lived up to that oath, going out day and night, sometimes working fourteen, sixteen, eighteen and sometimes twenty and thirty hours straight, to protect homes and land from raging wildfires. Even though he was not paid overtime and the last nine years, after major back surgery, were with increasing pain that had to be dealt with by taking a narcotic pain medication, muscle relaxants and anti-inflammatory drugs.

While Mr. Tyler was risking his life and well being for his State, it was breaking its own laws set up to protect injured workers, to defraud and damage him and breaking Federal **F.L. S. A.**

A state doctor (Friedman), working at a state hospital, never gave Mr. Tyler a MMI date or permanency rating even though his type of back injury was recognized as a permanent impairment by **F. S. §440.49. (See appendix pg. U-V)**

Dr. Earp, who had been Mr. Tyler's orthopedic surgeon since January, 1979, when Mr. Tyler was run

over, full length of the body by a bulldozer, said (1992) that doctors are threatened with "black listing" if they do not do what insurance companies tell them to do.

His attorney, (Wines) lied and defrauded him. An attorney who was licensed by the State of Florida.

Crawford and Company, who was hired by the State of Florida to act as their agent, was required by **F. S. 626.869(5)(1995)** to know the workers' compensation laws and to abide by them. They defrauded Mr. Tyler and breached these laws. **(See appendix pg. GG-HH)**.

In 1992, when Mr. Tyler was told he must voluntarily take a demotion or be terminated he and his wife began to research what his rights were. That's when they read the statutes and state policy and procedure rules, learned about the **F.L.S.A** , doctor's reports, letters, missing MMI dates and permanency ratings. They also called the Florida Division of Insurance Fraud and they would not even meet with him and look at his evidence or investigate the missing MMI date and permanency rating.

Attached to the lawsuit are thirty-eight exhibits. Exhibit "J" and "L" prove Mr. Tyler's allegations concerning missing MMI date and permanency rating **(See appendix pg. HH-JJ.)**. Mr. Tyler was denied the right to discovery. [20]

WHEREFORE, Title 42 §1983 states, "subjects or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the constitution and laws," (this is what happened to Mr. Tyler) " shall be liable to the party injured in an action at law..." and this is what he is asking this Court to grant. Mr. Tyler moves this Court grant him his civil rights to an action at law and trial by jury.

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[20] "Dismissal of complaint before discovery is a device that must not be employed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." **Wade v. Johnson Controls, Inc., 603 F. 2d 19, 20 (2d Cir. 1982)**

By: Lynda S. Tyler, Next Friend and Durable Power of attorney for Petitioner and Don R. Tyler, Petitioner
5730 JoAnn Road, Haines City, FL 33844
941/422-4140

APPENDIX

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA, DON R. TYLER, Plaintiff, vs. STATE OF FLORIDA-GOVERNOR LAWTON CHILES and DEPARTMENT OF INSURANCE-TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT-DIRECTOR R. J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD-DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES-COMMISSIONER BOB CRAWFORD, and FLORIDA DEPARTMENT OF FORESTRY-DIRECTOR L. EARL PETERSON, and CRAWFORD AND COMPANY-CEO FORREST MINIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M. D., and J. MASON WINES, attorney-at-law, Defendants, Case No. GC-G-94-541, **ORDER DISMISSING SECOND AMENDED COMPLAINT WITH PREJUDICE,** In accordance with this Court's January 11, 1996, "Order Granting Defendants' Motions

to Dismiss or Quash the Second Amended Complaint," the Court orders that Plaintiff's Second Amended Complaint be, and that the same is hereby, dismissed with prejudice. The court reserves jurisdiction to determine motions for attorneys' fees and costs filed within 45 days of the date of this order. DONE AND ORDERED in Chambers in Bartow, Polk County, Florida, on February 14, 1996. S/ J. Dale Durrance, HONORABLE J. DALE DURRANCE CIRCUIT JUDGE.

Copies to: Don R. Tyler, Plaintiff, Brian S. Duffy, Attorney for Forrest Minix, M. J. McDonald, Attorney for William L. Earp, M.D., Edwin A. Scales, Attorney for Government Defendants, and Joseph H. Varner, Attorney for J. Mason Wines. (filed in the clerks office in Bartow, FL, February 23, 1996)

IN THE CIRCUIT COURT IN AND FOR POLK COUNTY, FLORIDA, DON R. TYLER, Plaintiff, v. STATE OF FLORIDA, et al., Defendants., CASE NO. GCG94-541, ORDER DISMISSING COMPLAINT WITH PREJUDICE UPON REHEARING,

THIS MATTER came on for hearing on three pending motions: Plaintiff's request for reasonable accommodations in accordance with the Americans With Disabilities Act of 1990, Defendants' motion to declare F.S. 38.07 unconstitutional as applied and Plaintiff's Motion for reconsideration of recused judges' decisions. Present were Plaintiff, assisted by his wife; Edwin Scales on behalf of the governmental Defendants and Dr. William A. Friedman; M. J. McDonald on behalf of Dr. William L. Earp; and Laurie Dodson on behalf of Crawford & Co.; and, by telephone, Joseph Varner on behalf of Mason Wines.

The case comes before the Court with a Byzantine procedural history. Plaintiff originally filed this case in March of 1994, generally alleging fraud and conspiracy. In October of 1994, Judge Green recused.

Judge Roberts dismissed Plaintiff's Complaint with prejudice in April of 1995, Judge Roberts recused.

Judge Durrance dismissed Plaintiff's Complaint with prejudice in February of 1996. Judge Durrrance recused.

Along the way other judges were involved in varying degrees. The Court now reconsiders Judge Durrance's Order dismissing the case with prejudice upon Plaintiff's timely motion and finds that the Plaintiff and his wife ardently believe that the governmental Defendants conspired with the other Defendants to purposefully cripple him and then to deny him worker's compensation benefits to save the state money.

Plaintiff would have this Court replace well-settled rules of law with legal concepts which fit their view of the facts, suggesting, for example, that "silence is also fraud." Viewed from Plaintiff's perspective, there should be a remedy for the perceived wrong. The wrong, however, either did not occur or Plaintiff has been unable to allege facts which are legally sufficient to support it.

Plaintiff's motion for a reasonable accommodation at the hearing was made moot by his wife's participation

Defendants' motion to declare F.S. 38.07 unconstitutional as applied on due process grounds and because it violates the separation of powers doctrine is

granted in part. For the reasons stated herein, the Court does not reach the due process issue and grants the motion to the extent that Fla. R. Jud. Admin. 2.160 conflicts with F. S. 38.07. Accordingly, it is

ORDERED AND ADJUDGED that the motion to dismiss the Amended Complaint is **GRANTED** WITH PREJUDICE. THE Court retains jurisdiction to decide costs and attorney's fees, if any. The Plaintiff is notified that he has 30 days to appeal this Order to the Second District Court of Appeal. No further motions for rehearing will be entertained.

DONE AND ORDERED in Bartow, Polk County, Florida, this 18th day of July, 1996. S/ Robert A. Young, **ROBERT A. YOUNG,** Circuit Judge, COPIES FURNISHED TO: DON R. TYLER,, EDWIN A. SCALES, JOSEPH H. VARNER, M. J. McDONALD, LAURIE DODSON. (Filed in the clerks office in Bartow, FL, September 22, 1996).

IN THE CIRCUIT COURT IN AND FOR POLK COUNTY, FLORIDA, DON R. TYLER, Plaintiff, v. STATE OF FLORIDA, et al., Defendants. CASE NO.

GCG94-541, ORDER ON PLAINTIFF'S MOTION FOR CLARIFICATION AND NOTICE FOR JURY TRIAL

THIS MATTER came on for consideration without a hearing on the Plaintiff's Motion for Clarification of "order Denying Motion for Disqualification of Judge" alleging the prior recusals were not on the motion of the Plaintiff, and the Plaintiff's Notice for Jury Trial claiming the Court did not dismiss Plaintiff's Second Amended Complaint.

Because the Court intended to, and by its earlier order, did dismiss Plaintiff's Second Amended Complaint partly with prejudice and because at least one prior recusal was the product of Plaintiff's Motion for Disqualification, it is

ORDERED AND ADJUDGED THAT THE Plaintiff'S Motion for clarification is hereby **DENIED**, and the Plaintiff's Notice for Jury Trial is hereby stricken as premature.

DONE AND ORDERED in Bartow, Polk County, Florida, this 29 day of August, 1996. S/Robert A. Young, **ROBERT A. YOUNG**, circuit Judge, COPIES FURNISHED

TO: DON R. TYLER, EDWIN A. SCALES, III, JOSEPH H. VARNER, M. J. McDONALD, LAURIE DODSON, (filed in the clerks office in Bartow, FL on September 3, 1996).

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA, November 19, 1997, DON R. TYLER, Appellant, v. STATE OF FLORIDA-GOVERNOR LAWTON CHILES and DEPARTMENT OF INSURANCE-TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT-DIRECTOR R. J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD-DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES-COMMISSIONER BOB CRAWFORD, and FLORIDA DEPARTMENT OF FORESTRY-DIRECTOR L. EARL PETERSON, and CRAWFORD AND COMPANY-CEO FORREST MINIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M. D., and J. MASON WINES, attorney-at-law. Appellees. Case No. 96-04302, BY ORDER OF THE COURT: ORDER DISMISSING APPEAL

Don Tyler appeals a final order dismissing his

second amended complaint with prejudice, which was filed on February 23, 1996. Tyler filed his notice of appeal on September 30, 1996. Because the notice was untimely, we dismiss the appeal for lack of jurisdiction.

The time for taking an appeal is a jurisdictional requirement established by Florida Rule of Appellate Procedure 9.110(b). Where the notice of appeal is not filed within thirty days of rendition, the appellate court is precluded from exercising jurisdiction over the appeal. See Peltz v. District Court of Appeal, Third Dist., 605 So. 2d 865, 866 (Fla. 1992); Apone v. Green, 249 So. 2d 488, 488 (Flas. 2d DCA 1971).

The determinative issue in this case centers on the rendition date of the February 23, 1996, order. Tyler argues that his motion for clarification filed February 28, 1996, delayed rendition of the order. However, Tyler's motion for clarification was not an "authorized" motion that would delay rendition of the final order. See Fla. R. App. P. 9.020(h); see also Wagner v. Bieley, Wagner & Assoc. Inc., 263 So. 2d 1, 3 (Fla. 1972) (holding that an unauthorized motion not

permitted under the rules has no effect on rendition); Adventist Health System/Sunbelt Inc. v. Kiss. 510 So. 2d 971, 971 (Fla. 5th DCA 1987).

While Florida Rule of Appellate Procedure 9.020(h) was amended in 1992 to ensure that motions for clarification were included in those types of motions that delay rendition, the motion for clarification referred to in the rule is the appellate motion for clarification under Florida Rule of Appellate Procedure 9.330. See Committee Notes to Rule 9.020, subdivision (g), (1995). The Florida Rules of civil Procedure do not authorize the filing of a motion for clarification.

Thus, the only way that Tyler's motion for clarification would be an "authorized" motion that would delay rendition would be if it were deemed to be a motion for rehearing. See Fla. R. Civ. P. 1.530 (1996). However, Tyler's motion for clarification cannot be considered a motion for rehearing because he failed to raise any matters that were not previously considered. See Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962).

Nevertheless, this court recognized that rendition of the February 23, 1996, final order was delayed through a different method. Judge J. Dale Durrance, who entered the February 23, 1996, final order, subsequently was disqualified.

On June 14, 1996, Tyler filed a timely motion for reconsideration. This motion effectively revived the trial court's jurisdiction over the case for the limited purpose of reconsidering previous judicial orders entered by Judge Durrance. See § 38.07, Fla. Stat. (1995); Fla. R. Jud. Admin. 2.160(h).

The Case was reassigned to Judge Robert A. Young. Judge Young granted Tyler's motion for reconsideration, and on July 22, 1996, entered an order which essentially affirmed Judge Durrance's previous final order. Once Judge Young's order dated July 22, 1996, was filed, the trial court's substantive jurisdiction evaporated and the February 23, 1996, order was rendered. See Cantera v. District Court of Appeal, 555 So. 2d 360 (Fla. 1990).

Tyler was required to file his notice of appeal

within thirty days of Judge Young's order dated July 22, 1996. Because Tyler did not file his notice of appeal until September 30, 1996 this court is without jurisdiction. See Janelli v. Pagano, 492 So. 2d 796 (fla. 2d DCA 1986). Accordingly, this appeal is hereby dismissed.

PARKER, C.J., and PATTERSON and NORTHCUTT, JJ., Concur. I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER s/Wm. Haddad WILLIAM A. HADDAD, CLERK, Seal: DISTRICT COURT OF APPEAL, STATE OF FLORIDA, SECOND DISTRICT, cc: Don R. Tyler, Edwin A. Scales, Esquire, Brian S. Duffy, Esquire, Mary L. Wakeman, Esquire, Laurie T. Dodson, Esquire. Marlene S. Reiss, Esquire, Joseph H. Varner, Esquire.

Supreme Court of Florida, Monday, May 11, 1998, DON R. TYLER, Petitioner, v. LAWTON CHILES, GOVERNOR, et al., Respondents. CASE NO. 92,378

Petitioner's Motion to Amend His Jurisdictional Brief and Appendix filed in the above cause is denied.

A True Copy, TEST: s/ Sid J. White Sid J. White, Clerk, Supreme Court, Seal: SUPREME COURT OF THE STATE OF FLORIDA, bdm cc: Mr. Don R. Tyler, Ms. Lynda S. Tyler, Mr. Edwin A. Scales, III, Mr. Joseph H. Varner, Mr. Brian s. Duffy, Ms. Laurie Dodson Ms. Mary L. Wakeman, Ms. Marlene S. Reiss.

Supreme Court of Florida, WEDNESDAY, MAY 27, 1998, DON R. TYLER, Petitioner, v. LAWTON CHILES, GOVERNOR, et. Al., Respondents. CASE NO. 92,378, 2ND DISTRICT COURT OF APPEAL NO. 96-04302

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. app. P. 9.330(d).

Upon consideration of the Motions for Attorney's

Fees filed in the above styled cause by the attorneys for respondents, Government Respondents and William A. Friedman, M.D., Crawford and Company and J. Mason Wines,

IT IS ORDERED that said Motions be and the same are hereby denied.

OVERTON, SHAW, HARDING, WELLS AND ANSTEAD, JJ., concur.

A True Copy, TEST: s/ Sid J. White, sid J. White, Clerk, Supreme Court, Seal: SUPREME COURT OF THE STATE OF FLORIDA, H cc: Hon. William A. Haddad, Clerk, Hon. Richard M. Weiss, Clerk, Hon. Robert A. Young, Judge, Mr. Don R. Tyler, Mr. Brian S. Duffy, Mr. Joseph H. Varner, Mr. Edward A. Scales, III, Ms. Marlene S. Reiss, Ms. Lynda S. Tyler, Ms. Mary Lalley Wakeman, Ms. Laurie Dodson.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR HARDEE, HIGHLANDS, AND POLK COUNTIES, FLORIDA

ADMINISTRATIVE ORDER NO. 1-21.0

RE: AMERICANS WITH DISABILITIES ACT OF 1990

WHEREAS, the Americans with Disabilities Act 1990 (ADA) requires that reasonable accommodations be provided to requesting , qualified persons with disabilities in order that they might participate fully in court programs, services, activities, and benefits; and

WHEREAS, it is the intent of the Tenth Judicial Circuit to facilitate provision of reasonable accommodations when requested by qualified persons with disabilities;

IT IS ORDERED that all communications noticing court proceedings including, but not limited to, subpoenas for trial, jury summons, notice of hearings, notice for depositions and all other court related proceedings shall contact the individual or agency sending the notice not later than seven days prior to the proceeding to insure that reasonable accommodations are available...

DONE AND ORDERED at Bartow, Florida, this 31st day of May, 1995. s/ Randall G. McDonald, Randall G. McDonald, Chief Judge, s/ Charles A. Davis, Jr., Charles

A. Davis, Jr., Chief Judge-elect, recorded June 12, 1995.

F. S. §38.07— Effect of orders entered prior to disqualification; petition for reconsideration— When orders have been entered in any cause by a judge prior to the entry of any order of disqualification under s. 38.02 or s. 38.05, any party to the cause may, within 30 days after the filing in the cause of the order of the chief judge of the circuit or Chief Justice of the Supreme Court, as provided for in s. 38.09, petition the judge so designated for a reconsideration of the orders entered by the disqualified judge prior to the date of the entry of the order of disqualification... **Such a petition shall be granted as a matter of right.** (Emphasis added.)

F. S. §744.1012 Legislative Intent — The legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all his civil and legal rights and that such deprivation may be unnecessary. The Legislature further finds that it is desirable to make available the least restrictive form of

guardianship to assist persons who are only partially incapable of caring for their needs. Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights...

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§1961 (1) "racketeering activity" means (A) any act or threat involving,,, robbery, bribery, extortion,...which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: Section 201 (relating to bribery), Section 1341 (relating to mail fraud), Section 1503 (relating to obstruction of justice), Section 1513 (relating to retaliating against a witness, victim, or an informant)

§1959 **(a)**whoever,...maims...any individual in violation of the laws of any State or the United States or attempts or conspires to do, shall be punished—(2) for maiming, by imprisonment for not more than thirty years or a fine of not more than $30,000, or both: (6) for attempting or conspiring to commit a crime involving maiming...by imprisonment for not more than three years or a fine of not more than $3,000, or both.

Misprision. A word used to describe an offense which does not possess a specific name. *United v. Perlstein, C.C.A.N.J., 126 F. 2d 789, 798.* But more particularly and properly the term denotes either: (1) a contempt against the sovereign, the government, or the courts of justice, including not only contempt's of court, properly so called, but also all forms of seditious or disloyal conduct and leze-majesty; (2) maladministration of public office; neglect or improper performance of official duty, including peculation of public funds; (3) neglect of light account made of a crime, that is, failure in the duty of a citizen to endeavor to prevent the commission of a

crime, or, having knowledge of its commission, to fail to reveal it to the proper authorities.

Negative misprision. The concealment of something which ought to be revealed; that is misprision in the third of the specific meanings given above.

Positive misprision. The commission of something which ought not to be done; that is, misprision in the first and second of the specific meanings given above.

Misprision of felony. The offense of concealing a felony committed by another, but without such previous concert with or subsequent assistance to the felon as would make the party concealing an accessory before or after the face (—id). Elements of the crime are that the principal committed and completed the felony alleged, that the defendant had full knowledge of that fact, that the defendant failed to notify the authorities, and that defendant took an affirmative step to conceal the crime. *U S v. Celambrone, C.A. Nev., 750 F. 2d 1416, 1517.*

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States conceals and does not as soon as possible

make known the same to some judge or other person in civil or military authority under the United States, is guilty of the federal crime of misprision of felony. 18 U.S.C.A. s.s. 4..0.

Fla. State Constitution Art. I §2. Basic rights.—All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry...No person shall be deprived of any right because of race, religion or physical handicap. **§9. Due Process.**— No person shall be deprived of life, liberty or property without due process of law, ... **§21. Access to courts.**—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. **§22. Trial by jury.**—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number jurors, not fewer than six, shall be fixed by law.

F. S. §440.10(1)(a) Every employer coming within the

provisions of this chapter, including any brought within the chapter by waiver of exclusion or if exemption, **shall be liable for, and shall secure, the payment to his employees...of the compensation payable under s.s. 440.13, 440.15, and 440.16.**

F. S. §440.11(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee...except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee...may elect to claim compensation under this chapter or to **maintain an action at law...**

F. S. §440.11(b) Upon joint petition of all interested parties, a lump-sum payment in exchange for the employer's or carrier's release from liability for future medical expenses...may be allowed at anytime in any case after the injured employee has attained **maximum medical improvement.**

F. S. §440.12(b) when the claimant has reached **maximum recovery** and returned to his former or

equivalent employment with no substantial reduction in wages, such approval of a reasonable advance payment of a part of the compensation payable to the claimant may be given...

F. S. §440.49(6)(a) Reimbursement is not allowed under this section unless it is established that the employer knew of the pre-existing **permanent physical impairment** prior to the occurrence of the subsequent injury or occupational disease, and that the **permanent physical impairment** is one of the following:

19. Herniated intervertebral disk
20. Surgical removal of an intervertebral disk or spinal fusion

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Diskectomy (discectomy) - Surgical removal of a herniated intervertebral disk.

F. S. §440.15(a)(1) (1995) Once the employee has reached the date of maximum medical improvement, impairment benefits are due and payable within 20 days

after carrier has knowledge of the impairment.

F. S. §440.105(b) It shall be unlawful for any attorney or other person, in his individual capacity or in his capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity form a person on account of services rendered fora person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Chief Judge of Compensation Claims.

F. S. §440.105(4)(b) It shall be unlawful for any person:

1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefits or payment under this chapter.

4. To knowingly assist, conspire with, or urge any person to engage in activity prohibited by this section.

F. S. §440.105 (4)(c) It shall be unlawful for any

physician licensed under chapter 458...to knowingly and wilifully assist, conspire with, or urge any person to fraudulently violate any of the provisions of this chapter. **F. S. §440.105(4)(d)** It shall be unlawful for any person or governmental entity licensed under chapter 395 to maintain or operate a hospital in such a manner so that such person or governmental entity knowingly and willfully allows the use of the facilities of such hospital by any person, in a scheme or conspiracy to fraudulently violate any of the provisions of this chapter. **F. S. §440.105(4)(e)** It shall be unlawful for any attorney or other person, in his individual capacity or in his capacity as a public or private employee, or any firm, corporation, partnership, or association, to knowingly assist, conspire with, or urge any person to fraudulently violate any of the provisions of this chapter.

IN THE SUPREME COURT STATE OF FLORIDA

DON R. TYLER, Plaintiff, Petitioner, vs. STATE OF FLORIDA-GOVERNOR LAWTON CHILES, et al. Defendants, Respondents, CASE NO. 92,378,

SUPPLEMENTAL AMENDMENT TO PETITIONER'S JURISDICTIONAL BRIEF

Petitioner Questions the Legitimacy of the Lower Court Order for the following reasons:

a. It is just a typed order (with an opinion written on it) with the facing sheet attached but there was nothing else in the case file showing where it issued from. The clerk in the Second district court said it was typed by the judges and given to William A. Haddad, Clerk to sign **(See Appendix) (see appendix pg.BB-GG)**

b. It is different in form from two other cases submitted in the amended appendix which have the same chief judge, Parker. *McWhirter, Reeves, Mcgothlin, Davidson, Rief & Bakas, P.A. v. Weiss,* 704 So. 2d 214 (Fla 2d DCA, 1998) and *Newsome v. State of Florida,* 704 So. 2d 213 (Fla 2d DCA, 1998) **(See Appendix)**.

C. The facing sheet that would have been typed before the results of the hearing was known is labeled **"(Order Dismissing Appeal)**. How

could the results of the decision be known before the judges met. Note that the decision is not on the facing sheet of the other two cases....

e. Facing sheet has a check mark by publish yet this case, 96-04302, has never been published in the Southern Reporter. Mrs. Tyler called Ms. Ann Eling of West Publishing on Friday, March 20, 1998 and was told that case 96-04302 had never been sent to them for publication. Why?

f. Mrs. Tyler called the clerk's office at the Second District Court on March 20, 1998 and asked how the cases are chosen to be published in the Southern Reporter and the clerk said all the cases are published. The other two cases were published....

h. There was also an order dated June 24, 1997 requesting a supplemental brief on whether the motion for clarification was an authorized motion. There is nothing in the case file that shows where this order originated from **(See Appendix)**. **(not copied for appendix)**

i. On March 8, 1996, Petitioner filed a Petition for Writ of Mandamus or in the Alternative Petition for Writ of Prohibition, 96-00985, with the Second District Court of Appeal. Please see attached letter from Mr. & Mrs. Tyler to then Chief Judge Threadgill showing what took place concerning this Mandamus.**(see appendix pg. BB-GG)**

Petitioner, **Don R. Tyler**, further moves this Court to investigate the legitimacy of the lower court orders and grant him his day(s) in court and trial by jury...

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA, JANUARY 14, 1998, DON R. TYLER, Appellant(s), v. STATE OF FLORIDA-GOV. LAWTON CHILES, et al., Appellee(s). Case No. 96-04302 BY ORDER OF THE COURT:

Appellant, pro se, having filed a motion for rehearing or order dismissing appeal and motion for clarification of timeliness of appellant's request for oral argument in the above-styled case, upon consideration,

it is

ORDERED that the motion for rehearing is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER s/ signature is not legible WILLIAM A. HADDAD, CLERK, Seal: DISTRICT COURT OF APPEAL, STATE OF FLORIDA, SECOND DISTRICT, cc: Mr. Don R. Tyler, Edwin A. Scales, Esq., Brian S. Duffy, Esq. Marlene S. Reiss, Esq., Joseph H. Varner, Esq.

May 5, 1996

Honorable Edward F. Threadgill, Jr., Chief Judge, Second District Court of Appeal, P. O. Box 327, Lakeland, FL 33802

Dear Sir: Certified Mail No.P310814627

It is regrettable that we are having to report this wrong doing...This is what happened: On March 8, 1996 we filed a petition for writ of mandamus or in the alternative petition for writ of prohibition with the 2nd DCA. On March 13, 1996 and again on March 22, 1996, we called and asked one of the clerks if the writ had

been sent to the judges. On both occasions we were told no.

On March 26, 1996 we were sent a copy of an Order which denied these petitions...On April 10, 1996, we brought our Motion for Clarification and asked to have a copy of what the judges had written. We spoke with Rhonda Williams (this is the name we were given later by our giving her description over the phone) and she first showed us the original of the order signed by Mr. Haddad. We told her we wanted a copy of what the judges sent to Mr. Haddad. She then went to Mr. Haddad with the file and he kept it, she finally came back and said that Mr. Haddad would be with us shortly. When Mr. Haddad came, he held the file up about three or four feet from us, separated by a glass partition and said, see. After being told at least three times by Mr. Tyler, no I can't see, Mr. Haddad finally handed the folder under the partition. There, written in dull pointed, light pencil, in cursive that was a little hard to read, on the front sheet of our original paperwork was written,

"petition denied

mandamus and prohibition"

this was followed by three sets of dates and initials and everything appeared to be written with the same pencil. We got into a discussion about being given no opinion and how we had been given this same treatment by circuit court judges and forgot to get a copy. When we got home we realized that we had not gotten a copy and decided that we would return the next morning for a copy, because we thought we might need this for a later appeal.

On April 11, 1996, we returned to the 2nd DCA, and this time we were waited on by Mandy McClain (again we were given this name by giving a description over the phone later). We told her that we wanted a copy of what the judges had written because we had forgotten to get one the previous day. At first she seemed unable to find the file, then after she got the file, we saw her with Rhonda Williams, she came back a couple of times acting nervous and apologetic, she still did not give it to us so that we could show her what page we wanted a

copy of. We then saw her talking with Rhonda Williams and Carol Stockrahm. Before this conference, they were all out of our sight at various times. They talked for several minutes and Carol Stockrahm glanced in our direction several times. Finally, Carol Stockrahm came over and held the file up several feet from us and covering a penciled notation on the bottom of the petition said, we don't usually give out copies of this, we cover it up and copy the page. We told her that we wanted a copy of the notation, we already had a copy of the page itself. She indicated that it was not policy to do so and we told her that it was accessible to the public and we had a right to a copy. She then changed her tactics and started saying that since we had spoken with Mr. Haddad about the file for some time the previous evening, that she should speak with him before giving us a copy. We told her that it did not matter that we had spoken with Mr. Haddad, we had a right to a copy and expected to get one. She went away, supposedly to call Mr. Haddad, and finally, we received a copy of the page with the notation. All this took at least 20, if

not 30 minutes, why?

We believe this is why, this time, in what appeared to be sharper pointed pencil, was written,

"Deny petition
for writ of mandamus and
petition for writ of prohibition."

And below the line, which was not there before either, were three dates and initials. This time the writing was printing and cursive and readable at a glance.

If this was done by the judges how did these things occur overnight and more than two weeks after the last judge supposed initialed it:

1. Different wording on 4/11/96 than on 4/10/96
2. Different handwriting on 4/11/96 than on 4/10/96
3. Sharper pencil used on 4/11/96 than on 4/10/96
4. No line drawn under the writing we were shown on 4/10/96
5. Line drawn under the writing we were given a copy of on 4/11/96

6. Why would judges use a pencil to write decision?

7. Why wouldn't Ms. Stockrahm let us see or give us a copy of the file tracking?

If you need any more proof, why would the writ go all the way to Tampa and then back to Lakeland and then back to Tampa, and then back to Lakeland. Also, when we called on March 22, 1996 and asked the clerk if the petition had been sent to the judges yet and she checked and said no, she would have checked the tracking on the computer because the file must be kept track of at all times. According to the dated initials, the last judge saw the file on March 21, 1996, so if the file actually went to the judges, it would have shown up on the tracking screen and she would have said yes, but we do not know the decision or something like that....

Respectfully yours,

s/Don R. Tyler, Lynda S. Tyler

F. S. §626.869(5)(1995) Any person holding a license and appointment and who engages in **adjusting workers' compensation insurance** shall certify to the

department every 2 years, at least 90 days prior to the renewal date of his appointment, the fact that the licensee has completed a course of instruction designed to inform the licensee as to the current workers' compensation laws of this state, so as to **enable him to engage in such business as a workers' compensation insurance adjuster fairly and without injury to the public and to adjust all claims in accordance with the policy or contract and the workers' compensation laws of this state.**

February 8, 1994, Ms. Teresa Dowdy, Crawford & Company, P. O. Box 1350 A, Tallahassee, FL 32317

Dear Ms. Dowdy:

This letter is being hand delivered to you today. It is in reference to my wife's telephone conversation with you yesterday afternoon. At that time my wife asked you some questions about my file #F78-0300-0232. She asked if we wrote you a letter about certain things in my file if you would verify that they are or are not in the file. You indicated that you would do this.

Please check the file carefully and let me know if the following items are in my file:

1. DWC4 Rating form dated after 7/1/83 and before 1/29/91. yes_____ no__X__

2. Claim for Benefits form dated anytime after 5/26/83 or later, but before 1991. yes_____ no__X__

3. Maximum Medical Improvement Date dated after 7/1/83 and before 1/1/93. yes_____ no__X__

If any of the above items are in the file, I hereby request a copy.

Please sign below and have witnessed that you have answered the above questions.

Signed s/Teresa Dowdy Date2-16-94

Witness s/Mark Street Date2-16-94

Requested by, s/Don R. Tyler....

September 28, 1984, R. J. Woelke, Supervisor, Crawford & Company, 369 Office Plaza, Tallahassee, Fl. 32301, Subject: Don Tyler

Dear Mr. Woelke:...Any additional permanency that might have been developed through the treatment that

he had in Gainesville, would probably be based on a rating that they would give him, as a separate entity. It certainly appears that the problem that he had stemmed from the injury that he originally had in 1979, however, the neurologic complication was never rated by this office as such, and therefore we would not change our rating. There may, however, be an additional rating onto the 20% that we gave him orthopaedically, this should come independently from the neurosurgeon, in my opinion. If they have given him a rating, then this should be combined with the rating that we gave him, as being additive in terms of the AMA Tables. If I can be of further service, please let me know. Yours Truly, William L. Earp, M.D., cc: Mason Wines, Attorney at Law, WLE/mer

Supreme Court, U.S.
FILED
SEP 14 1998
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(2)

No. 98-274

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

DON R. TYLER,

Petitioner,

v.

STATE OF FLORIDA, et. al.,

Respondents.

On Petition for Writ of Certiorari
To the Circuit Court, Tenth Judicial Circuit,
Polk County, Florida

Brief in Opposition of Respondents State of Florida, Department of Insurance, Florida Division of Risk Management, Florida Division of Insurance Fraud, Florida Department of Agriculture and Consumer Services, and Florida Division of Forestry

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QUESTION PRESENTED

I.

Should this Court decline to grant certiorari to review a fact-specific application of a Florida Rule of Appellate Procedure?

PARTIES TO THE CASE

DON R. TYLER: Petitioner

THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA DIVISION OF RISK MANAGEMENT, FLORIDA DIVISION OF INSURANCE FRAUD, FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, FLORIDA DIVISION OF FORESTRY, CRAWFORD AND COMPANY, WILLIAM L. EARP, M.D., WILLIAM FRIEDMAN, M.D., and J. MASON WINES, Esq.: Respondents

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES, AND REGULATIONS INVOLVED

1. Rule 10, Supreme Court Rules

2. Florida Rule of Appellate Procedure 9.110(b)

(b) Commencement. Jurisdiction of the court under this rule shall be invoked by filing 2 copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.

STATEMENT OF THE CASE

Respondents object to Petitioner's Statement of the Case because the statement discusses matters not appearing on the face of the orders for which he seeks review and for which there is no support in the record. In addition, Petitioner included in his appendix a copy of the Order dated July 18, 1996 and included in parenthesis a statement that this Order was filed in the clerk's office on September 22, 1996 when in fact it was filed on July 22, 1996, as reflected in the Order of the Second District Court of Appeal. For these reasons, Respondents present this statement summarizing the facts as they appear in the orders on review.

On February 23, 1996, the trial court entered an order dismissing Petitioner's second amended complaint with prejudice. Petitioner filed a motion for clarification on February 28, 1996. Subsequently, the judge who entered that order was disqualified. Petitioner then filed a timely motion for reconsideration of the order dismissing his second amended complaint, requesting reconsideration based on the disqualification of Judge Durrance, who entered the

order.

The new judge assigned to the case, Judge Young, granted the motion for reconsideration. After a review, the Court entered an order on July 22, 1996 essentially affirming Judge Durrance's prior order and dismissed the Petitioner's complaint with prejudice. On September 30, 1996, petitioner filed a notice of appeal on September 30, 1996.

The Second District Court of Appeal denied jurisdiction to hear the appeal because Petitioner failed to file his notice of appeal within 30 days of the July 22, 1996 order as required by Rule 9.110(b), Fla. R. App. P. The Second District Court of Appeal's Order centered around the date Judge Durrance's original order dismissing the complaint with prejudice was rendered. The Second District held that Petitioner's motion for clarification filed on February 28, 1996 was not an authorized motion that delayed rendition of the order; however, the February 23, 1996 order was delayed by Judge Durrance's disqualification and Petitioner's motion for reconsideration, reviving the trial court's jurisdiction for the limited purpose of reviewing the previous judicial orders entered by Judge

22, 1996, the trial court's subsequent jurisdiction evaporated, and the February 23, 1996 order was rendered. Thus, with a July 22, 1996 rendition date, Petitioner's notice of appeal was untimely.

Petitioner then petitioned the Florida Supreme Court who declined jurisdiction to hear the appeal.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF A FLORIDA RULE OF APPELLATE PROCEDURE.

Rule 10, Sup. Ct. R., states that review on a writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for compelling reasons. Such compelling reasons principally include cases in which a United States court of appeals has entered a decision in conflict with another United States court of appeals or with a state court of last resort on an important federal question; a state court of last resort has decided an important federal question in a way which conflicts with the decision of another state court or United States court of appeals; or a state court or United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court.

Rule 10, Sup. Ct. R.; *see also, Braxton v. United States*, 500 U.S. 344, 111 S.Ct. 1854 (1991). This Court has repeatedly held that it will not exercise its certiorari jurisdiction merely to review a decision of a state court turning upon an analysis of the particular facts involved. *See, e.g. Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974); *Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318 (1984); *United States v. Johnston*, 268 U.S. 220, 45 S.Ct. 496 (1924).

Respondents submit that it is precisely this type of decision which Petitioner now asks this Court to grant certiorari to review. None of the Rule 10 reasons referenced above exist in the present case to justify certiorari review. Contrary to Petitioner's statement of the issues, this case involves no conflict among state courts or United States courts of appeal. Neither does it involve the

resolution of an important federal question in conflict with this Court's prior decisions. Instead this case involves a fact-specific application of Florida's appellate rules of procedure to determine whether Petitioner's notice of appeal was timely.

By Writ of Certiorari, Petitioner now seeks to have this Court review the propriety of the lower court's dismissal of his action, the ruling made by Florida's Second District Court of Appeal that the notice of appeal was untimely, and the Florida Supreme Court's denial of jurisdiction to hear the matter. Petitioner characterizes the issues on appeal as whether he was denied by these rulings his right to a jury trial under Title 42 U.S.C. §1983, U.S.C.A. VII, and the Fair Labor Standards Act of 1938. Petitioner seeks to have this Court review as a substantive matter the original order of dismissal entered by Judge

Durrance and affirmed upon reconsideration by Judge Young. In his petition, however, Petitioner fails to demonstrate how the original dismissal involves an appropriate conflict concerning an important federal question in order to justify this Court's review. That failure notwithstanding, the real question at issue is simply whether Petitioner properly preserved his right to appeal under Florida appellate rules of procedure.

As such, review of this case would first require this Court to determine whether as a procedural matter the Petitioner's appeal to the Second District Court was timely. This Court does not use its certiorari jurisdiction to re-evaluate fact-specific applications of state court rules of procedure. Rule 10, Sup. Ct. R. Under the doctrine of comity, state courts should be allowed to develop rules governing their own state courts and decide issues

concerning those rules without oversight from the federal system, especially when the interpretation of those rules concern no important federal rights. *See, i.e., Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102S.Ct. 2515 (1982)(in state court civil proceedings where state interests are involved, the Federal Courts should abstain unless state law clearly bars the imposition of constitutional claims). In this case, the Second District Court decided that Petitioner's appeal was untimely under Florida's appellate rules of procedure. Despite Petitioner's attempt to characterize it as something else, this decision does not involve a conflict concerning an important federal question. Rather, it involves only a factual determination based upon the interpretation of these appellate rules under Florida's decisional precedent. As such, there is no basis to grant certiorari review, and the

Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 98-274

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

DON R. TYLER,

Petitioner,

vs.

STATE OF FLORIDA-GOVERNOR LAWTON CHILES, and FLORIDA DEPARTMENT OF INSURANCE-COMMISSIONER OF INSURANCE TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT-DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF FRAUD-DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES-COMMISSIONER BOB CRAWFORD, and FLORIDA DIVISION OF FORESTRY-DIRECTOR L. EARL PETERSON, and CRAWFORD AND COMPANY-CEO FORREST MINIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, Attorney at Law,

Respondents.

On Petition For Writ Of Certiorari To The Circuit Court, Tenth Judicial Circuit, Polk County, Florida

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Proceedings Below

At the trial court level, petitioner Tyler filed a cryptic original complaint and two amended complaints which attempted to assert causes of action titled as fraud, gross and malicious negligence as a result of fraud, denial of due process of law, and fraudulently denied overtime. (Petitioner's Brief at 14). All three versions of the petitioner's complaints were dismissed by the trial court on motions from the respective defendants, the final dismissal being with prejudice. (Appendix A-C).

Petitioner filed an appeal of the trial court's final order dismissing his second amended complaint in the Second District Court of Appeal for the State of Florida on September 30, 1996 (Petitioner's Brief at 14). Petitioner's appeal to the Second District was dismissed as untimely, pursuant to Florida Rule of Appellate Procedure 9.110(b), on November 19, 1997. (Appendix D).

On February 18, 1998, the petitioner applied to the Supreme Court of Florida for discretionary review of the District Court of Appeal's order of dismissal. Petitioner Tyler asked the Florida Supreme Court to accept jurisdiction based on Article V, section (3)(b)(3) of the Florida Constitution, which provides that the Florida Supreme Court shall have jurisdiction to review opinions of the district courts of appeal which expressly and directly conflict with opinions from the state supreme court or other district courts of appeal. On May 27, 1998, the Supreme Court of Florida declined to accept jurisdiction and denied review. (Petitioner's Brief at 14).

REASONS FOR DENYING THE WRIT

I. The Federal Claims for Which Petitioner Seeks Certiorari Were Never Addressed or Properly Presented to the State District Court of Appeal or the State Supreme Court.

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257 (1998). (Petitioner's Brief at 2). 28 U.S.C. § 1257(a) states in pertinent part that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . . " With "very rare exceptions," the United States Supreme Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [the Court] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Court has] been asked to review." *Adams v. Robertson*, 117 S.Ct. 1028, 1029 (1997). "When the highest state court is silent on a federal question before [the Court], [the Court] assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption." *Id.* Part of the petitioner's burden is to persuade the court "that the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment." *Id.*

In the instant case, petitioner Tyler failed to appeal the dismissal of his second amended complaint to the state district court of appeal in a timely manner pursuant to Florida Rule of Appellate Procedure 9.110(b). Because of petitioner's failure to comply with state rules of procedure, the federal issues that petitioner would have this

Court review were never "addressed by, or properly presented to" the state district court. *Adams*, 117 S.Ct. at 1029. Furthermore, the Florida Supreme Court lacked jurisdiction to review the district court's order of dismissal pursuant to Article V, section (3)(b)(3) of the Florida Constitution. Thus, petitioner's failure to comply with state procedural rules is an adequate and independent ground for the state courts to disregard his claim and for this Court to deny certiorari. *See, e.g., Adams*, 117 S.Ct. at 1030 (stating that petitioners had done nothing to demonstrate that they had complied with applicable state rules or to explain why failure to comply with those rules would not be an adequate and independent ground for the state court to disregard the claim); *Hammerstien v. Superior Court of California, et al.*, 341 U.S. 491, 492 (1951) (holding that where the state supreme court had refused to grant jurisdiction because petitioner failed to utilize proper channel of review, United States Supreme Court had no jurisdiction to review the proceedings).

II. The State District Court of Appeal Dismissed Petitioner's Appeal Pursuant to a Well Established State Rule of Procedure that Serves a Valid State Interest.

The Second District Court of Appeal for the State of Florida dismissed petitioner's appeal due to the fact that petitioner failed to comply with Florida Rule of Appellate Procedure 9.110(b). (Appendix D). Rule 9.110(b) states that jurisdiction of the court is invoked by filing an appeal within thirty (30) days of the order to be reviewed. The order of dismissal that petitioner wished the district court to review was filed on February 23, 1996. (Appendix D). Following a motion for reconsideration, an order

was entered on July 22, 1996 confirming the February 23, 1996, order. (Appendix D). Pursuant to Rule 9.110(b), petitioner had thirty days from July 22, 1996, to lodge his appeal with the state district court. *See also, Schwertfeger v. Constant*, 109 So. 2d 173, 176 (Fla. 2d DCA 1959) (holding that an order dismissing a complaint "with prejudice" was a final judgment for appeal purposes). Petitioner did not file an appeal with the district court until September 30, 1996, well in excess of the thirty day requirement of Rule 9.110(b). (Petitioner's Brief at 14). Therefore, petitioner's appeal was dismissed.

Where a state rule of procedure is reasonable and is clearly announced, failure to comply with that rule will serve as an adequate and independent ground for a state court to disregard a petitioner's claim in most cases. *See Henry v. Mississippi*, 379 U.S. 443, 448 n.3 (1964). Florida Rule of Appellate Procedure 9.110(b) is a reasonable and clearly announced rule. The thirty day filing requirement of Rule 9.110(b) is jurisdictional and is not subject to discretion or arbitrary application. *See Williams v. State*, 324 So. 2d 74, 77 (Fla. 1975). Thus, failure to comply with Rule 9.110(b) is an "irremedial jurisdictional defect" for *any* appeal filed by *any* appellant in the State of Florida. *Franchi v. Florida Dept. of Commerce, Etc.*, 375 So. 2d 1154, 1155 (Fla. 4th DCA 1979).

Given the jurisdictional nature of Rule 9.110(b), there is no reason to believe that there was "an attempt on the part of the state court to evade the decisions of Federal questions . . . by unwarranted resort to alleged rules under local practice." *Louisville & Nashville R.R. v. Woodford*, 234 U.S. 46, 51 (1914). "Unless there is an unwarranted resort to rules of practice by the state court to

evade the decision of a Federal question, [the Court] will not review the [state court's] judgment." *See Woodford*, 234 U.S. at 46.

Petitioner Tyler chose not to comply with the Florida Rules of Appellate Procedure, and as a result, his appeal was denied. In essence, petitioner asks this Court to bypass the Florida state court system and to review a decision that was never afforded review by the state district court of appeal due to petitioner's own non-compliance with state procedural rules. As this Court has explained before, "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 117 S.Ct. at 1031 (internal quotations omitted). Rule 9.110(b), Florida Rules of Appellate Procedure, is valid, reasonable, and well announced, and petitioner's failure to comply with it does not vest the Court with jurisdiction for certiorari.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT IN AND
FOR POLK COUNTY, FLORIDA

DON R. TYLER,

Plaintiff,

vs.

CASE NO.
GC-G-94-541

STATE OF FLORIDA:
(including, but not limited
to) DEPARTMENT OF
INSURANCE / DIVISION
OF RISK MANAGEMENT
/ DIVISION OF
INSURANCE FRAUD /
DEPARTMENT OF
AGRICULTURE AND
CONSUMER SERVICES /
DIVISION OF FORESTRY,

Defendants.

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

THIS CAUSE came before the Court on May 23, 1994 upon Defendants' Request for Extension of Time, Plaintiff's Request for Denial of Extension of Time, Plaintiff's Motion for Default by the Court and Defendants' Motion to Dismiss. Present were the Plaintiff, DON R. TYLER, appearing pro se, and Edwin A. Scales, III, counsel for the Defendants.

The Court ruled on Defendants' Motion to Dismiss, therefore, making the other motions moot. The Court, after hearing argument, reviewing the pleadings and being otherwise more fully advised, hereby

ORDERS AND ADJUDGES that Defendants' Motion to Dismiss is granted without prejudice. Plaintiff has twenty (20) days from the date of this Order to file an Amended Complaint. If Plaintiff does not file an Amended Complaint within twenty (20) days, then this Order shall act as a dismissal with prejudice.

DONE in Chambers at Bartow, Polk County, Florida this 2 day of June 1994.

/s/ Oliver L. Green, Jr.
OLIVER L. GREEN, JR.,
CIRCUIT JUDGE

Copies to:

Don R. Tyler

Edwin A. Scales, III, Esquire

APPENDIX B

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

DON R. TYLER,

Plaintiff,

vs.

Case No. GC-G-94-541

STATE OF FLORIDA – GOVERNOR LAWTON CHILES and FLORIDA DEPARTMENT OF INSURANCE – TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT – DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD – DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES – COMMISSIONER BOB CRAWFORD and FLORIDA DIVISION OF FORESTY – DIRECTOR L. EARL PETERSON and CRAWFORD AND COMPANY – CEO FORREST MINNIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, attorney-at-law,

Defendants.

ORDER

This matter came before the Court on motions to dismiss Plaintiff's Amended Complaint filed by Defendants State Of Florida – Governor Lawton Chiles, Florida Department Of Insurance – Tom Gallagher, Florida Division of Risk Management – Director R.J. Castellanos, Florida Division Of Insurance Fraud – Director Frank Doolittle, Florida Department Of Agriculture Consumer Services – Commissioner Bob Crawford, Florida Division Of Forestry – Director L. Earl Peterson, Crawford and Company – CEO Forrest Minnix, William L. Earp, M.D., and J. Mason Wines. The Court also heard a Motion to Quash filed by Forrest Minnix, the CEO of Crawford & Company and Plaintiff's Motions for Default against the State Defendants.

A hearing was held on September 21, 1994 during which the Court heard argument from all of the above-named parties. After hearing argument from the parties, reviewing the pleadings and otherwise being fully informed in the matter, it is

ORDERED AND ADJUDGED that the Motion to Dismiss filed by Defendants State Of Florida – Governor Lawton Chiles, Florida Department Of Insurance Tom Gallagher, Florida Division of Risk Management – Director R.J. Castellanos, Florida Division of Insurance Fraud – Director Frank Doolittle, Florida Department Of Agriculture Consumer Services – Commissioner Bob Crawford, and Florida Division Of Forestry – Director L. Earl Peterson is **GRANTED**. It is further

ORDERED AND ADJUDGED that the Motion to Dismiss filed by Defendant Crawford & Company is **GRANTED.** It is further

ORDERED AND ADJUDGED that the Motion to Dismiss filed by Defendant William L. Earp, M.D. is **GRANTED.** It is further

ORDERD AND ADJUDGED that the Motion to Dismiss filed by Defendant J. Mason Wines is **GRANTED.** It is further

ORDERED AND ADJUDGED that the Motion to Quash filed by Forrest Minnix is **GRANTED.** It is further

ORDERED AND ADJUDGED that the Motions for Default filed by Plaintiff is **DENIED.**

DONE AND ORDERD this 7 day of October, 1994 at Bartow, Polk County, Florida.

/s/ Oliver L. Green, Jr.
Oliver L. Green, Jr.
Circuit Judge

Copies furnished to:

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APPENDIX C

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

DON R. TYLER,

Plaintiff,

vs.

Case No. GC-G-94-541

STATE OF FLORIDA – GOVERNOR LAWTON CHILES and FLORIDA DEPARTMENT OF INSURANCE TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT – DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD – DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES – COMMISSIONER BOB CRAWFORD and FLORIDA DEPARTMENT OF FORESTRY – DIRECTOR L. EARL PETERSON and CRAWFORD AND COMPANY – CEO FORREST MINNIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, attorney-at-law,

Defendants.

_____/

ORDER DISMISSING SECOND AMENDED COMPLAINT WITH PREJUDICE

In accordance with this Court's January 11, 1996, "Order Granting Defendants' Motions to Dismiss or

Quash the Second Amended Complaint," the Court orders that Plaintiff's Second Amended Complaint be, and that the same is hereby, dismissed with prejudice.

The Court reserves jurisdiction to determine motions for attorneys' fees and costs filed within 45 days of the date of this order.

DONE AND ORDERED in Chambers in Bartow, Polk County, Florida, on Febr. 14, 1996.

/s/ J. DALE DURRANCE
HONORABLE J.
DALE DURRANCE
CIRCUIT JUDGE

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APPENDIX D

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

DON R. TYLER, Appellant, v. STATE OF FLORIDA – GOVERNOR LAWTON CHILES and DEPARTMENT OF INSURANCE TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT – DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD – DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES – COMMISSIONER BOB CRAWFORD and FLORIDA DEPARTMENT OF FORESTRY – DIRECTOR L. EARL PETERSON and CRAWFORD AND COMPANY – CEO FORREST MINNIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, attorney-at-law, Appellees.	)	Case No. 96-04302

BY ORDER OF THE COURT:

ORDER DISMISSING APPEAL

Don Tyler appeals a final order dismissing his second amended complaint with prejudice, which was filed on

February 23, 1996. Tyler filed his notice of appeal on September 30, 1996. Because the notice was untimely, we dismiss the appeal for lack of jurisdiction.

The time for taking an appeal is a jurisdictional requirement established by Florida Rule of Appellate Procedure 9.110(b). Where the notice of appeal is not filed within thirty days of rendition, the appellate court is precluded from exercising jurisdiction over the appeal. *See Peltz v. District Court of Appeal, Third Dist.*, 605 So. 2d 865, 866 (Fla. 1992); *Apone v. Green*, 249 So. 2d 488, 488 (Fla. 2d DCA 1971).

The determinative issue in this case centers on the rendition date of the February 23, 1996, order. Tyler argues that his motion for clarification filed February 28, 1996, delayed rendition of the order. However, Tyler's motion for clarification was not an "authorized" motion that would delay rendition of the final order. *See* Fla. R. App. P. 9.020(h); *see also Wagner v. Bieley, Wagner & Assoc. Inc.*, 263 So. 2d 1, 3 (Fla. 1972) (holding that an unauthorized motion not permitted under the rules has no effect on rendition); *Adventist Health System/Sunbelt Inc. v. Kiss*, 510 So. 2d 971, 971 (Fla. 5th DCA 1987).

While Florida Rule of Appellate Procedure 9.020(h) was amended in 1992 to ensure that motions for clarification were included in those types of motions that delay rendition, the motion for clarification referred to in the rule is the appellate motion for clarification under Florida Rule of Appellate Procedure 9.330. *See* Committee Notes to Rule 9.020, subdivision (g), (1995). The Florida Rules of Civil Procedure do not authorize the filing of a motion for clarification.

Thus, the only way that Tyler's motion for clarification would be an "authorized" motion that would delay rendition would be if it were deemed to be a motion for rehearing. *See* Fla. R. Civ. P. 1.530 (1996). However, Tyler's motion for clarification cannot be considered a motion for rehearing because he failed to raise any matters that were not previously considered. *See Diamond Cab Co. of Miami v. King*, 146 So. 2d 889, 891 (Fla. 1962).

Nevertheless, this court recognizes that rendition of the February 23, 1996, final order was delayed through a different method. Judge J. Dale Durrance, who entered the February 23, 1996, final order, subsequently was disqualified.

On June 14, 1996, Tyler filed a timely motion for reconsideration. This motion effectively revived the trial court's jurisdiction over the case for the limited purpose of reconsidering previous judicial orders entered by Judge Durrance. *See* § 38.07, Fla. Stat. (1995); Fla. R. Jud. Admin. 2.160(h).

The case was reassigned to Judge Robert A. Young. Judge Young granted Tyler's motion for reconsideration, and on July 22, 1996, entered an order which essentially affirmed Judge Durrance's previous final order. Once Judge Young's order dated July 22, 1996, was filed, the trial court's substantive jurisdiction evaporated and the February 23, 1996, order was rendered. *See Cantera v. District Court of Appeal*, 555 So. 2d 360 (Fla. 1990).

Tyler was required to file his notice of appeal within thirty days of Judge Young's order dated July 22, 1996. Because Tyler did not file his notice of appeal until September 30, 1996 this court is without jurisdiction. *See*

Janelli v. Pagano, 492 So. 2d 796 (Fla. 2d DCA 1986). Accordingly, this appeal is hereby dismissed.

PARKER, C.J., and PATTERSON and NORTHCUTT, JJ., Concur.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

/s/ Wm. A. Haddad
WILLIAM A. HADDAD, CLERK

cc: Don R. Tyler
Edwin A. Scales, Esquire
Brian S. Duffy, Esquire
Mary L. Wakeman, Esquire
Laurie T. Dodson, Esquire
Marlene S. Reiss, Esquire
Joseph H. Varner, Esquire [SEAL]

STATE OF FLORIDA
COUNTY OF POLK

THIS COPY IS A TRUE COPY OF ORIGINAL ORDER DISMISSING APPEAL DATED 11-19-97 ON FILE IN THIS OFFICE.
WITNESS, MY HAND AND OFFICIAL SEAL THIS 5TH DAY OF MARCH, 1998 [SEAL]

/s/ William A. Haddad
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT
COURT OF APPEAL

Supreme Court, U.S.
FILED
SEP 21 1998
OFFICE OF THE CLERK

No. 98-274

In The

Supreme Court of the United States

October Term, 1997

★★★

DON R. TYLER, Plaintiff, Petitioner

vs.

STATE OF FLORIDA-GOVERNOR LAWTON CHILES and DEPARTMENT OF INSURANCE-COMMISSIONER OF INSURANCE TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT-DIRECTOR R. J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD-DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES-COMMISSIONER BOB CRAWFORD, and FLORIDA DIVISION OF FORESTRY-DIRECTOR L. EARL PETERSON, and CRAWFORD AND COMPANY-CEO FORREST MINIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M. D., and J. MASON WINES, attorney at law,

Defendants, Respondents.

★★★

On Petition For Writ of Certiorari To the Circuit Court, Tenth Judicial Circuit, Polk County, Florida

★★★

REPLY TO BRIEF IN OPPOSITION

★★★

By Lynda S. Tyler, Next Friend and
Durable Power of Attorney for
Petitioner and
Don R. Tyler, Petitioner
5730 JoAnn Road
Haines City, FL 33844 941/422-4140

18 pp

1. How the Federal Claims for Which Petitioner Seeks Certiorari Were Addressed and Properly Presented to the State Court.

2. How the State District Court of Appeal Breached Well Established State and Federal Case Law Supporting **U. S. Title 28 §1291** When It or It's Clerks Dismissed Petitioner's Appeal.

3. How State District Court of Appeal Ruling Breached **Fla. R. App. P. 9.110(b)**.

The parties to this case are as follows:

Don R. Tyler, Petitioner

and

The State of Florida, and **Florida Department of Insurance**, and **Florida Division of Risk Management,** and **Florida Division of Insurance Fraud**, and **Florida Department of Agriculture and Consumer Services,** and **Florida Division of Forestry**, and **Crawford and Company**, and **William L. Earp, MD.**, and **William A. Friedman, MD.**, and **J. Mason Wines**, attorney at law, Respondents.

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2. How the State District Court of Appeal Breached Well Established State and Federal Case Law Supporting **U. S. Title 28 §1291** When It or It's Clerks Dismissed Petitioner's Appeal.
3. How State District Court of Appeal Ruling Breached **Fla. R. App. P. 9.110(b)**.

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STATEMENT OF THE CASE

Petitioner restates the case as it appears in his Petition for Writ of Certiorari except the typographical error of Appendix page "e" which should read (Filed in the clerks office in Bartow, FL, July 22, 1996) instead of September. Errors do occur as Respondents, State of Florida, should realize when they stated October Term, 1998 instead of 1997 and page 2 and 3 states "Judge 22, 1996" in their Brief in Opposition.

Petitioner would ask this Court to also show that his Petition for Writ of Certiorari was mailed by U.S. Mail on August 10, 1998, which puts the Petition within 90 days of the Florida Supreme Court's denial of Petitioner's Motion to Amend His Jurisdictional Brief and Appendix (Petitioner's brief at Appendix "k").

ARGUMENT

For Granting the Writ

1. **How the Federal Claims for Which Petitioner Seeks Certiorari Were Addressed and Properly Presented to the State Court.**

A letter was placed in the case file by Judge Roberts on April 25, 1995 which stated:

> **"I, Don R. Tyler, further believe that my Fourteenth Amendment rights have been violated by you, Circuit Judge Susan Wadsworth Roberts, in not allowing me equal protection of the laws and the right to redress the wrongs done to me. I also feel that I have again been denied "due process of law" through these actions."**

On June 24, 1997 the 2nd DCA required the filing of a supplemental brief dealing with jurisdiction and it contains the following inserts:

> **"...thus Mr. Tyler was denied due process of law..." "..again Mr. Tyler was denied due process, both on September 18, 1995 and January 8, 1996." "Mr. Tyler was continually denied due process of law by Judge Durrance." "Mr. Tyler was denied discovery in a hearing but never in a written order so that he could appeal it." "Judge Durrance did not allow a**

trial by jury, but dismissed Mr. Tyler's Second Amended Complaint..." "Mr. Tyler did not want to appeal, he wanted a trial by jury. He certainly did not want to spend over $1,000.00 that he could ill afford to appeal his case. According to all the laws, statutory, constitutional, and procedural, he should not have had to appeal his case before it went to a trial by jury...Judge Durrance and Judge Young's orders should be null and void for illegal procedure and breach of constitutional law, and due process of law,...WHEREFORE, Appellant, DON R. TYLER, moves this Court grant his appeal and remand his Second Amended Complaint back for trial by Jury."

The 2nd DCA denied Petitioner's appeal on jurisdiction.

Petitioner stated in his Motion to Amend his Jurisdiction Brief and Appendix to the Florida Supreme Court:

"Petitioner has been denied his constitutional

right to a trial by jury." and asked the Court to **"grant him his day(s) in court and trial by jury."** The Florida Supreme Court denied this amendment.

The case file contains many references to Petitioner being denied his federal civil rights which were presented both to the Civil and District Appeals Court and even the Florida Supreme Court. Some of these were presented in the Petition for Writ of Certiorari and in this Reply.

2. How the State District Court of Appeal Breached Well Established State and Federal Case Law Supporting U. S. Title 28 §1291 When It or It's Clerks Dismissed Petitioner's Appeal.

Respondent Crawford and Company presented case **Schwertfeger v. Constant, 109 So 2d 173 (Fla. 2nd DCA 1959)**. At page 175 of that case it states:

> **"The rule set out herein, followed by the Supreme Court of Florida seems to be substantially in accord with the Federal decisions which have held that an order granting a motion to dismiss a complaint, but**

not actually dismissing it, is not a final decision within the meaning of 28 U.S.C.A. § 1291, and therefore is not appealable. See *Turnbull v. Cyr, 184 F. 2d 117 and cases cited therein.*" Renard v. Kirkeby Hotels, Inc., 99 So. 2d 719, 721.

"Interlocutory order granting motion to dismiss was not appealable "final decision", 28 U.S.C.A. § 1291." United States of America v. Woodard, 257 F. 2d 805 (5th Clr. 1958)"

This is still the accepted case law of Florida, even after 2nd DCA ruling to the contrary against Petitioner. **Department of Revenue v. Bander, 702 So. 2d 1341 (Fla. 5th DCA 1997)** The ruling was Dec. 12, 1997 (holding Whether order is final for purposes of appeal is not merely a question of semantics, but rather one of jurisdiction. Orders which grant motions to dismiss but lack words of actual dismissal are not appealable because they are not final.) The 2nd DCA did not have jurisdiction over Judge Young's July 22, 1996 order, it was not a final order, it only granted motions to dismiss.

3. How State District Court of Appeal Ruling Breached Fla. R. App. P. 9.110(b).

Williams v. State of Florida, 324 So. 2d 74 (Fla. 1975) Presented by Respondent Crawford and Company at page 78 (holding "Appeals from **final decisions**, orders, judgments or decrees shall be commenced within 30 days from the *rendition* of the **final decision**, order judgment or decree appealed from,...") *emphasis added.*

Fla. R. App. P. § 9.110(b) 1977 Amendment,

"Subdivision (b) and (c) establish the procedure for commencing an appeal proceeding. Within 30 days of the rendition of the **final order** the appellant must file 2 copies of the notice of appeal..." *emphasis added.*

Judge Young's July 22, 1996 order was not a final order and it was not appealable according to **Fla. R. App. P. § 9.110(b).** Judge Young also replaced this order with an amended order dated August 21, 1996. **Hunter v. Dennies Contracting Co., Inc., 693 So. 2d 615, 616 (Fla. 2d DCA 1997)** (holding at all times prior to entry of final

order terminating action, trial court has inherent authority to reconsider any of its nonfinal rulings, and if it deems it appropriate, to alter or retract them.)

The amended order also only granted motions to dismiss and as to the Amended Complaint, not the Second Amended Complaint **(See Appendix A)**. The only order of Judge Young's which said anything about dismissing the Second Amended Complaint was the September 3, 1996 order which Petitioner appealed on September 30, 1996 when he complied with **Fla. R. App. P. § 9.110(b) (See Appendix B).**

CONCLUSION

Petitioner was denied his Fourteenth Amendment rights to equal protection of the laws when he was defrauded of his rights to the Florida Worker's Compensation laws.

Petitioner was defrauded of overtime which breached the Fair Labor Standards Act of 1938.

The Second Amended Complaint contains a denial of due process count and Petitioner has been further denied due process of law by the Florida court system.

Petitioner made proper demands for a trial by jury on all his counts and this was denied by the lower court with each new judge which breached **Fla. R. Civ. P. § 1.430 (a) Right Preserved.** The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate. This also breached the Seventh Amendment of the United States Constitution.

A motion to dismiss is not even a proper motion to file when a party has made a demand for a trial by jury. **Fla. R. Civ. P. § 1.420(b)** "After a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of evidence, any other party may move for a dismissal on the ground that on the facts and the law the party seeking affirmative relief has shown no right to relief."

Petitioner was not allowed to present his evidence, much less to present it to a jury. The lower court has also granted attorney fees against Mr. Tyler. Where will the wrong doing end?

WHEREFORE, DON R. TYLER, moves this Court grant him his Petition for Writ of Certiorari so that he might have his day(s) in court and trial by jury.

Respectfully:

Lynda S. Tyler, Next Friend and Durable Power of Attorney for Petitioner

and

Don R. Tyler, Petitioner

5730 JoAnn Road

Haines City, FL 33844

941/422-4140

Appendix A

IN THE CIRCUIT COURT AND FOR POLK COUNTY, FLORIDA

DON R. TYLER,

Plaintiff,

v. **CASE NO. GCG94-541**

STATE OF FLORIDA, et al.,

Defendants.

_____/

AMENDED ORDER DISMISSING COUNTS I-III OF THE COMPLAINT WITH PREJUDICE UPON REHEARING AND COUNT IV WITHOUT PREJUDICE

THIS MATTER came on for consideration without a hearing on the Plaintiff's Response to Order Denying in Part Plaintiff's Motion for Clarification. After consideration of the Plaintiff's well-written response, the Court confirms its earlier Order except as amended herein.

The case comes before the Court with a Byzantine procedural history. Plaintiff originally filed this case in March of 1994, generally alleging fraud and conspiracy. In October of 1994, Judge Green recused.

Judge Roberts dismissed Plaintiff's Complaint with prejudice in April of 1995. Judge Roberts recused.

Judge Durrance dismissed Plaintiff's Complaint with prejudice in February of 1996. Judge Durrance recused.

Along the way other judges were involved in varying degrees. The Court now reconsiders Judge Durrance's Order dismissing the case with prejudice upon Plaintiff's timely motion and finds that the Plaintiff's Amended Complaint fails to state a cause of action. This notwithstanding the fact that Plaintiff and his wife ardently believe that the governmental Defendants conspired with the other Defendants to purposefully cripple him and then to deny him worker's compensation benefits to save the state money.

Plaintiff would have this Court replace well-settled rules of law with legal concepts from Plaintiff's perspective, there should be a remedy for the perceived wrong. The wrong, however, either did not occur or Plaintiff has been unable to allege facts which are legally sufficient to support it.

Plaintiff's motion for a reasonable accommodation at the hearing was made moot by his wife's participation.

Defendants' motion to declare F.S. 38.07 unconstitutional as applied on due process grounds and because it violates the separation of powers doctrine is granted in part. For the reasons stated herein, the Court does not reach the due process issue and grants the motion to the extent that Fla. R. Jud. Admin. 2.160 conflicts with F. S. 38.07. According, it is

ORDERED AND ADJUDGED that the motion to dismiss the Amended Complaint is **GRANTED** with prejudice as to all Defendants,

except that the Motion to Dismiss with prejudice is **DENIED** with regard to the State of Florida as to Count IV, a claim alleging a violation of the Fair Labor Standards Act. Count IV is dismissed without prejudice. Plaintiff has 20 days from the date hereof to file an amended claim for under-compensated overtime **only** alleging with specificity the time periods involved. The Court retains jurisdiction to decide costs and attorney fees, if any. The Plaintiff is notified that he has 30 days to appeal this Order as to Counts I through III to the Second District Court of Appeal.

DONE AND ORDERED in Bartow, Polk County, Florida, this 21st day of August, 1996

s/Robert A. Young
ROBERT A. YOUNG
Circuit Judge

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LAURIE DODSON, ESQUIRE, P. O. Drawer 229, Tallahassee, FL 32302

IN THE CIRCUIT COURT IN AND FOR POLK COUNTY, FLORIDA

DON R. TYLER,
Plaintiff,

v. **CASE NO. GCG94-541**

STATE OF FLORIDA, et al.,
Defendants.
_____/

ORDER ON PLAINTIFF'S MOTION FOR CLARIFICATION AND NOTICE FOR JURY TRIAL

THIS MATTER came on for consideration without a hearing on the Plaintiff's Motion for Clarification of "Order Denying Motion for Disqualification of Judge" alleging the prior recusals were not on the motion of the Plaintiff, and the Plaintiff's Notice for Jury Trial claiming the Court did not dismiss Plaintiff's Second Amended Complaint.

Because the Court intended to, and by its earlier order, did dismiss Plaintiff's Second Amended Complaint partly with prejudice and because at least one prior recusal was the product of Plaintiff's Motion for Disqualification, it is

ORDERED AND ADJUDGED that the Plaintiff's Motion for Clarification is hereby **DENIED,** and the Plaintiff's Notice for Jury Trial is hereby stricken as premature.

DONE AND ORDERED in Bartow, Polk County, Florida, this 29 day of August, 1996. (Filed by Clerk September 3, 1996)

s/ Robert A. Young
ROBERT A. YOUNG
Circuit Judge

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